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In the Supreme Court of the United States

UNITED STATES OF AMERICA AND UNITED STATES DEPARTMENT OF AGRICULTURE

Petitioners,

v.

UNITED FOODS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* GERAWAN FARMING, INC., DELANO FARMS, INC., GALLO CATTLE COMPANY, COUNTRY EGGS, ROSEMARY FARMS, BIDART BROS., DUARTE NURSERY, INC., J. PHILIP GILLIGAN d/b/a GILLIGAN GROVES, LUCAS BROS. PARTNERSHIP AND SUSAN NEILL FRESH FRUIT COMPANY IN SUPPORT OF RESPONDENT

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BRIEF *AMICI CURIAE*

Pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States, Gerawan Farming, Inc., Delano Farms, Inc., Gallo Cattle Company, Country Eggs, Rosemary Farms, Bidart Brothers, Duarte Nursery, Inc., J. Philip Gilligan d/b/a Gilligan Groves, Lucas Brothers Partnership and Susan Neill Fresh Fruit Company respectfully submit this brief *amici curiae* in support of the respondent. This brief is presented with the consent of all parties. The required letters of consent have been filed with this brief.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici are California growers and shippers of agricultural products that are required — pursuant to federal or state legislative schemes similar to the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. §§ 6101, *et seq.* — to pay mandatory assessments to commodity-specific boards or commissions for use in generic advertising and promotional programs. These *amici* believe that compelled funding of generic advertising runs afoul of bedrock First Amendment principles.

Gerawan Farming, Inc. is a producer and shipper of table grapes, peaches, plums and nectarines that is required to pay assessments for generic advertising and promotions to the California Table Grape Commission (pursuant to California Food & Agriculture Code §§ 65500, *et seq.*), to the California Tree Fruit Agreement (pursuant to federal marketing orders promulgated under 7 U.S.C. §§ 601, *et seq.*), and to the California Plum Board (pursuant to California Food & Agriculture Code §§ 58601, *et seq.*).

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party to these proceedings authored, in whole or in part, this *amici curiae* brief. No other entity or person, aside from *amici*, made any monetary contribution for the preparation or submission of this brief to this Court.

Delano Farms, Inc. is a grower and shipper of table grapes, the Susan Neill Company is a shipper of table grapes and Lucas Brothers Partnership is a grower of table grapes. All are required to pay assessments to the California Table Grape Commission for generic advertising and promotions pursuant to California Food & Agriculture Code §§ 65500, *et seq*.

Country Eggs and Rosemary Farms are egg producers and shippers that are required to pay assessments for generic advertising and promotions to the California Egg Commission (pursuant to California Food & Agriculture Code §§ 75001, *et seq*.) and to the federally mandated Egg Commission (pursuant to the Egg Research and Consumer Information Act of 1980, 7 U.S.C. §§ 2701, *et. seq*.).

Duarte Nursery, Inc. grows and sells grape rootstocks for wine grapes, table grapes and raisins. It is required to pay assessments to the California Grape Rootstock Improvement Commission, which uses the money for research, publication of that research and for other speech-related activities pursuant to California Food and Agriculture Code §§ 74701, *et seq*.

Bidart Brothers, Inc. is a grower and shipper of various varieties of California apples that is required to pay assessments to the California Apple Commission for use in generic advertising and promotions pursuant to California Food & Agriculture Code §§ 75501, *et seq*.

J. Philip Gilligan, d/b/a Gilligan Groves, grows and markets avocados, and is required to pay assessments to the California Avocado Commission for use in generic advertising and promotions pursuant to California Food & Agriculture Code §§ 67001, *et seq*.

Gallo Cattle Company produces milk that it manufactures into its own world-renowned "Joseph Farms" cheeses. It is required to pay assessments to the California Milk Producers Advisory Board for use in generic advertising and promotions

pursuant to California Food & Agriculture Code §§ 58601, *et seq*.

SUMMARY OF ARGUMENT

The question in this case is whether the government may compel all participants in certain industries to contribute to collective advertising programs unrelated to any non-speech regulatory activity. Under these programs, an industry group, armed with the coercive power of the state, decides who will speak on behalf of the industry, what messages will be presented, and to what audience. It thus violates the fundamental principle embodied in the First Amendment to the United States Constitution that "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners." *Riley* v. *National Fed'n of the Blind, Inc.*, 487 U.S. 781, 791 (1988).

A collective advertising program was upheld in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997) ("*Wileman*"), but only in the context of an agricultural marketing order that substantially collectivized the marketing of the affected product. In this case, petitioners seek to expand the holding of *Wileman* to permit the government to compel citizens to contribute to collective speech programs of any sort, whether or not related to regulatory programs, with the single limitation that they not be directed at political or ideological objectives. In Section I, we will show that this attempt to broaden the *Wileman* holding is inconsistent with the opinion in *Wileman*, with precedents prior to *Wileman*, and with the logic of the First Amendment. In Section II, we will show that the collectivization of marketing — while it serves the private interests of the dominant players in the industry — disserves the public interest and thus cannot possibly survive heightened scrutiny.

ARGUMENT

I. COMPELLED ADVERTISING PROGRAMS THAT ARE NOT INCIDENTAL TO NON-SPEECH-RELATED REGULATORY PROGRAMS IMPLICATE IMPORTANT FREE SPEECH CONCERNS AND MUST BE ACCORDED HEIGHTENED SCRUTINY

The First Amendment impact of mandatory collective advertising programs may not be as obvious as in the case of ideological or political speech, but to the producers and consumers involved, it is highly significant. This Court has recognized that free speech about products and prices is "indispensable to the proper allocation of resources in a free enterprise system." *Virginia State Bd. of Pharmacy* v. *Virginia Consumer Council*, 425 U.S. 748, 765 (1976). By compelling all producers of a particular commodity to support generic advertising desired by their politically powerful competitors, the government skews the marketplace of ideas in favor of the notion that the products are fungible. This makes it more difficult for producers like *amici*, who cultivate products of unusual quality, to get the word out to members of the public about the importance of differences between products.

We submit that the government has no legitimate interest in favoring one kind of message (generic) over another (product-specific), and that compelling respondent and *amici* to contribute to dissemination of generic advertising is a content-based speech compulsion, which violates the First Amendment. We recognize that because these programs involve commercial rather than political or ideological speech, they may be subject to a lower standard of review than is given to political or to ideological speech. And we recognize that there are times when mandatory collective speech may be a necessary incident to a broader regulatory program. But we urge the Court to extend serious constitutional scrutiny to freestanding programs of compelled commercial speech.

A. This Court's Decision In *Wileman* Must Be Read In Light Of Its Prior Compelled Speech Decisions

In *Wileman*, this Court rejected a First Amendment challenge to certain marketing orders promulgated by the U.S. Secretary of Agriculture under the Agricultural Marketing Agreement Act ("AMAA"), 7 U.S.C. §§ 601, *et seq.*, which compelled California tree fruit producers to fund generic advertising. In reaching that decision, the *Wileman* Court was not writing on a clean slate. It long had been settled that government efforts to compel constitutionally protected speech receive at least the same level of constitutional scrutiny as do government efforts to restrict speech. See, *e.g.*, *Riley*, 487 U.S. at 796-797 ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance"); *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 633 (1943) ("[I]nvoluntary affirmation could be commanded only on even more immediate and urgent grounds than silence."); see also *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n of California*, 475 U.S. 1, 19 (1986) (applying strict scrutiny to commission's order requiring utility to include opponent's messages in utility's billing envelopes); *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 661-662 (1994) (applying the intermediate scrutiny normally applied to content-neutral restrictions of speech to a federal law that compelled cable television companies to carry broadcast signals over their facilities).

Also settled prior to *Wileman* was the principle that government action that coerces financial support for the speech of other private speakers is largely equivalent for constitutional purposes to government action that directly compels a person to speak. See *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 233-235 (1977). The only distinction that this Court had made between the scrutiny to be accorded to forced funding of speech and that to be accorded to compelled speech was made in cases

where the compelled funding was part of a broader regulatory framework that compelled individuals to associate together in pursuit of a vital, non-speech-related governmental objective. In those cases, the Court had held that coerced contributions could survive constitutional scrutiny if they were used for activities "'germane' to the purpose for which compelled association was justified." *Keller* v. *State Bar of California*, 496 U.S. 1, 13 (1990). Thus, in *Abood*, the Court held that non-union members who were statutorily required to participate in an "agency-shop" agreement constitutionally could be compelled to fund "expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment" (431 U.S. at 225-226), all of which served the "important government interests" in labor stability (*id.* at 225). Accord *Lehnert* v. *Ferris Faculty Ass'n.*, 500 U.S. 507, 517 (1991). Similarly, in *Keller*, the Court held that attorneys who, as a condition of practicing law in California, were required to be members of the State's integrated bar could be compelled to provide funding for activities "germane" to the bar's core functions of regulating the legal profession and improving the quality of legal services. See 496 U.S. at 13-14.

Under these precedents — none of which were overruled in *Wileman* — it is apparent that compelled contributions to other private speakers for the purpose of collective commercial speech must be subject to (at least) intermediate scrutiny, unless the compelled speech is incidental to a non-speech-related regulatory program.

Much of the government's brief is devoted to the proposition that the promotion of generic advertising serves the legitimate governmental interest of stimulating consumer demand. See Pet. Br. 21-23, 27-28. This justification is directly speech-related, in that it depends on the communicative impact of the speech. It therefore goes to the core of the First Amendment. No program based on such a justification can be described as mere "economic regulation," or exempted from

heightened scrutiny under the First Amendment. Only if the program is justified on the basis of a necessary connection to a non-speech-related regulatory objective can such a program be subject to any lesser standard of review. Thus, insofar as the government asserts that its interest is simply in promoting a particular message — the generic virtue of certain products — it must fail as a matter of law.

The decision in *Wileman* was consistent with the foregoing precedents. In *Wileman*, the Court "stress[ed] the importance of the statutory context" in which the generic advertising programs existed. 521 U.S. at 469. Specifically, the Court explained that "[t]he business entities that [were] compelled to fund the generic advertising at issue in this litigation [did] so as a part of a broader collective enterprise in which their freedom to act [was] already constrained by the regulatory regime." *Ibid.* The *Wileman* majority emphasized that, as with *Abood* and its progeny, the compelled funding of generic advertising for California tree fruits was part of a broader regulatory program under which California tree fruit producers were compelled to associate with one another in order to "further the economic interests of the producers as a group." *Id.* at 475. Moreover, the *Wileman* majority repeatedly highlighted the comprehensiveness of the regulatory regime for California tree fruits, explaining that federal marketing orders had "displac[ed] unrestrained competition with Government supervised cooperative marketing programs," and "rest[ed] on an assumption that in the volatile markets for agricultural commodities the public w[ould] be best served by compelling cooperation among producers in making economic decisions that would be made independently in a free market." *Ibid.*; see also *id.* at 469 (California tree fruits were "marketed pursuant to detailed marketing orders that ha[d] displaced many aspects of inde-

pendent business activity that characterize other portions of the economy").[2]

It was thus in the context of a comprehensive regulatory regime that had "displac[ed] unrestrained competition" (521 U.S. at 475) that the *Wileman* majority concluded, under *Abood* and its progeny, that "generic advertising of [California tree fruits] is unquestionably germane to the purposes of the marketing orders." *Id.* at 473. As the majority explained: "Generic advertising is intended to stimulate consumer demand for an agricultural product ***in a regulated market***. That purpose is legitimate and consistent with the regulatory goals of the ***overall statutory scheme***." *Id.* at 476 (emphasis added). This makes sense because advertising is a part of marketing, and when marketing is performed on a collective and regulated basis, it follows that advertising must be collective as well.

However, when — as in the case of fresh mushrooms — competition in the market is performed on an individual and competitive basis, there is no regulatory scheme or purpose to which a generic advertising program can be deemed "germane." The Mushroom Act is a freestanding compelled speech program not "germane" to any other activity. Accordingly, the *Abood* analysis is inapplicable to this case. The Court instead should apply to the Mushroom Act the same level of scrutiny that it would apply to government efforts to compel respondent to promote a generic message of the government's choosing.

Amici wish to stress that collective speech programs are justified only in the context of particular kinds of regulation — regulation in which "competition" in marketing is displaced by

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[2] Petitioner and some of its supporting *amici* argue that the marketing order in *Wileman* did not in fact involve as comprehensive a set of marketing restrictions as the Court's opinion presupposed. See Pet. Br. 12, 21, 27-28; Brief of *Amici Curiae* States of California *et al.* at 6. Needless to say, the constitutional rationale in *Wileman* must be understood in light of the Court's assumptions regarding the program, and cannot be changed after the fact by substitution of a different set of factual assumptions.

industry "cooperation" (*Wileman*, 521 U.S. at 475) — analogous to the worker solidarity achieved under collective bargaining. The point is not that a heavily regulated industry loses its free speech rights. See *Pacific Gas & Elec. Co.*, *supra*; *Turner Broad. Sys.*, *supra*.[3] Instead, when marketing is cooperative rather than competitive, it follows that the cooperative efforts must extend to the speech as well as the purely economic aspects of the business. Collective speech programs are not justified merely because the industry is heavily regulated, but because the regulation is of a particular sort: limitations on competition in the interest of the industry as a whole. Only then is collective speech germane to the regulatory program.

B. The Solicitor General's Argument Would Expand Collective Speech Programs Beyond The Rationale In *Wileman*

Ignoring the analytical framework for compelled funding of speech within which the *Wileman* decision fits, the government asks this Court to permit forced funding of speech even when it is not germane to any regulatory program at all. Specifically, the government argues that the portion of the holding "set forth in Part III of the *Wileman Brothers* opinion" should be disregarded, in favor of an analysis based solely on the three additional criteria set forth in Part IV. Pet. Br. 21-22. Under these criteria, the government may compel producers of agricultural products to pay for private speech against their will if the speech programs: (1) "impose no restraint on the freedom of any producer to communicate any message to an audience"; (2) "do not compel any person to engage in any actual or

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[3] Petitioner's argument that it "would make little sense to require Congress, in order to assure the constitutionality of a generic advertising program, * * * to tack on other regulations" (Pet. Br. 25-26) is thus beside the point. Compelled speech is not justified by "tacking on" miscellaneous regulations. Speech can be compelled only when the collective speech is an inherent part of a regulatory program that is otherwise constitutional — in the way that collective speech is an inherent part of collective bargaining.

symbolic speech"; and (3) "do not compel the producers to endorse or to finance any political or ideological views." *Id.* at 15 (quoting *Wileman*, 521 U.S. at 469-470); see also *id.* at 11, 17, 24-25. This interpretation of *Wileman* suffers from two fatal flaws.

First, it would confer upon Congress and state legislatures virtual carte blanche to compel individuals and businesses to contribute to collective speech efforts devised by dominant elements of groups of which they are a part — so long as the subjects are nonpolitical and nonideological. (The first two criteria are meaningless in the context of compelled contributions to collective speech programs, because they are always satisfied.) Thus, car dealers (even of foreign imports) could be compelled to contribute to advertisements proclaiming "Buy American." Lawyers (even defense lawyers, and lawyers with old-fashioned notions of professional propriety) could be compelled to pay for ads on park benches urging accident victims to sue. Manufacturers of low-cost generic drugs could lose the comparative advantage they gain through not advertising, by being forced to pay for ad campaigns designed by their better-known competitors. The ads could even warn against the supposed dangers of buying "Brand X." None of these hypothetical programs would be constitutional under Part III of *Wileman*, because they are not ancillary to any legitimate governmental regulatory program (and presumably could not satisfy heightened constitutional scrutiny), but all of them would be constitutional under the government's strained analysis.

Indeed, the government's proposed principle would extend even beyond the commercial context — to compelled funding of collective speech on any nonpolitical, nonideological subject. Residents in a neighborhood could be required to give money to a neighborhood association to produce a local newspaper (so long as it avoided political and ideological subjects). Members of an industry could be forced to contribute toward the commu-

nicative activities (other than political lobbying) of their trade association. Drivers along a highway could be forced to pay money to a private group to produce cheerful billboard displays. Doctors could be forced to pay for the dissemination of first aid pamphlets. Dentists could be required to pay for a publicity campaign for children to brush more and floss. Any number of communicative activities that presently are voluntary could become mandatory. The *Wileman* decision did not contemplate so sweeping a change in First Amendment doctrine.

Second, if, as the government posits, the constitutional analysis turns only on the three criteria in Part IV, the Court's discussion of the *Abood* test in *Wileman* (see 521 U.S. at 471-474) — and the government's discussion of that test here (see Pet. Br. 11, 15-17, 18, 30) — would be redundant. Under *Abood*, as characterized by the government, mandatory contributions to speech are constitutional if they are ***either*** germane to their legislative purpose ***or are non-ideological***. See *id.* at 16 & n.9. Because, however, one of the three "vital" factors that, according to the government, distinguishes compelled generic mushroom advertising from unconstitutional abridgements of speech is that generic advertising "do[es] not compel * * * producers to * * * finance any political or ***ideological*** views" (*Wileman*, 521 U.S. at 469-470 (emphasis added)), it would never be necessary to apply the *Abood* test to these programs. The fact that the *Wileman* majority did apply *Abood* to the generic advertising program at issue in that case is itself proof that more than the "three vital distinctions" must be satisfied for such a program to withstand constitutional scrutiny.

Abood is easily reconciled to *Wileman* — and the *Wileman* Court's discussion of *Abood* is made intelligible — if we understand Part III of the *Wileman* opinion as setting a threshold requirement for the constitutionality of collective speech programs, prior to consideration of the three criteria in Part IV. The threshold requirement is that the compelled speech be

ancillary to a ***non-speech-related regulatory program***. It is not sufficient, as the government argues (Pet. Br. 19), for the compelled speech merely to be germane to a "'legitimate' governmental purpose." That is no restriction at all.

C. Requiring Producers To Contribute To Generic Advertising Affects Their Free Speech Rights

As noted above, the government contends that the Mushroom Act warrants only rational basis review because "the generic advertising program for mushrooms is unlike laws that have been held to violate the freedom of speech protected by the First Amendment." Pet. Br. 11. That argument implicitly is grounded upon the contention that the forced funding of generic advertising has no impact upon the free speech rights of the producers and handlers who are forced to fund generic advertising. The *Wileman* majority did not go so far. Instead, as explained above, the *Wileman* majority held that the infringement of individual producers' rights in that case was justified solely in light of the comprehensive collectivist marketing framework of which compelled generic advertising was only a part. When, as here, the market is fully competitive and an "individual competitor's interest [is] in maximizing its own sales" through independent advertising (*Wileman*, 521 U.S. at 475), the harm wrought by generic advertising programs on the marketing strategies of producers and handlers of agricultural products is substantial.

The collective advertising programs constitute a preference for one message over another: the message that the generic similarities in products are of greatest importance, over the message that differences in products are of greatest importance. For obvious reasons, many members of the mushroom and other agricultural industries prefer to emphasize the generic message. Respondent and *amici* prefer to emphasize the differences. It offends fundamental First Amendment principles for the government to favor one message's content over

another — to favor the majority's generic message over the dissenters' individual message.

A recent decision of the California Supreme Court — in which it held that the California Plum Marketing Order implicated a plum grower's state-based right to freedom of speech — explained how these harms are inflicted. In *Gerawan Farming, Inc.* v. *Lyons*, 12 P.3d 720 (Cal. 2000), the court, per Justice Mosk, explained that history "has witnessed burdens imposed on [producers and handlers of agricultural commodities] as a result [of generic advertising]." *Id.* at 743. Specifically, the court explained that producers and handlers like *amici*, who "develop and use brands in marketing their goods," are "disadvantaged by generic advertising in their competition against" producers and handlers who do not market branded products, because "[g]eneric advertising may portray goods as indistinctive in spite of brand, and may thereby minimize consumer desire to distinguish *inter se*." *Ibid.* (internal quotation marks, citation, and brackets omitted). Conversely, "[g]eneric advertising can be manipulated to serve the interests of some producers [and handlers] rather than others, as by allowing some to develop a kind of brand by means of funds assessed from all and then use it for their own exclusive benefit." *Ibid.*

The assumption, therefore, that collective advertising benefits the entire industry, and that respondent and *amici* are mere free riders, is inaccurate. The collective advertising programs are content-based preferences for some speakers over others that force dissenters to pay for, and be associated with, speech with which they disagree.

II. COMPELLED GENERIC ADVERTISING CANNOT WITHSTAND CONSTITUTIONAL SCRUTINY STRICTER THAN RATIONAL BASIS REVIEW

Once it is recognized that mandatory generic advertising programs are subject to some form of heightened scrutiny, it

becomes evident that they cannot be sustained. Indeed, far from being necessary to an important public purpose, the programs primarily serve the private interests of dominant members of the affected industries.

A. The Programs Serve The Private Interests Of Dominant Members Of The Industry At The Expense Of The Dissenters

As the California Supreme Court observed in *Gerawan*, generic advertising and promotional programs provide opportunities for some program participants to "hijack[]" the funds supplied by others "as [the hijackers] drive to their own destination." 12 P.3d at 743. The examples that follow, drawn from three different generic advertising programs, illustrate the practical realities of these programs.

1. The Federal Almond Marketing Order

An example drawn from the California almond industry illustrates how a generic advertising program can become a vehicle for promoting the products of a dominant member of a commodity promotion board at the expense of its competitors. See *Cal-Almond, Inc.* v. *United States Dep't of Agric.*, 14 F.3d 429 (9th Cir. 1993). Under the federal Almond Marketing Order ("Almond Order") that regulated the California almond handling industry from 1950 onward, the California Almond Board administered a generic almond promotional campaign. See *id.* at 433.[4] From 1950 through the early 1990s, Blue Diamond — an agricultural cooperative — controlled the ten-member Board, holding a total of six seats in each year but three. See *In re: Saulsbury Orchards and Almond Processing, Inc.*, AMA Docket No. F&V 981-4 (Dep't Agric. Jan. 23, 1991), *reprinted in relevant part in* Appendix to the Petition for a Writ of Certiorari at 149a, 165a, *Cal-Almond, Inc.* v. *United*

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[4] The Almond Order in effect at the time of the *Cal-Almond* decision was codified at 7 C.F.R. Part 981, pursuant to the AMAA, 7 U.S.C. § 608c. See *Cal-Almond*, 14 F.3d at 433.

States Dep't of Agric. (No. 97-1935). Additionally, Blue Diamond, which sold under its own brand name, "overwhelmingly dominate[d] the retail market" for almonds, having a market share of 92%. *Cal-Almond*, 14 F.3d at 438 & n.9.

The money to pay for the Board's generic advertising program came from mandatory assessments collected from almond handlers. See *Cal-Almond*, 14 F.3d at 433. However, the Almond Order also authorized a handler to receive a credit against its assessment for amounts spent in purchasing its own advertising, up to the amount of the assessment used for generic advertising. See *ibid.* & nn. 1-2. In order to qualify for the credit, the advertising had to satisfy the extensive requirements of the creditable advertising regulations, and the Board alone (which was controlled by Blue Diamond) determined whether a handler's advertising satisfied those requirements. See *id.* at 433. Not accidentally, the regulations had the practical effect of allowing handlers to receive a credit for advertising almonds for retail sale to consumers but not for advertising almonds as ingredients. See 7 C.F.R. §§ 981.441(c)(3)(iv), (c)(5) (1992); see also *Cal-Almond*, 14 F.3d at 440. As a result, handlers of almonds sold as ingredients (such as for ice cream or breakfast cereal) were forced to pay the entire assessment but received no benefit, because the Board used the funds to promote ***retail*** almond sales. By contrast, Blue Diamond (which dominated the retail almond market) was able both to obtain full credit for advertising its own brand and to benefit a second time when the Board used the assessments paid by handlers of ingredient almonds to run "generic" advertisements promoting the retail sale of almonds for consumption.

This system prompted the Ninth Circuit, when it reviewed the constitutionality of the Almond Order, to conclude that "there seems to be no logical justification for these types of restrictions other than * * * to benefit Blue Diamond * * * at the expense of smaller handlers such as appellants, who sell

primarily to ingredient manufacturers." *Cal-Almond*, 14 F.3d at 440.

2. The California Milk Promotion Marketing Order

The experience of *amicus* Gallo Cattle Company under California's Milk Promotion Marketing Order ("Milk Order") exemplifies how generic advertising programs dilute the value of a company's hard-won reputation for premium quality, branded products.[5] Gallo is a milk producer-handler that manufacturers 100% of its liquid milk output into premium quality cheese, which it markets under the brand name "Joseph Farms." See Deborah K. Boyett, *The Effect of Glickman v. Wileman Brothers & Elliott, Inc. on Nongeneric Commodities: A Narrow Focus on a Broad Rule*, 9 SAN JOAQUIN AGRIC. L. REV. 95, 111-112 (1999). Pursuant to the Milk Order, Gallo is required to pay mandatory promotional assessments to the California Milk Producers Advisory Board ("CMAB") for use in generic advertising. See *id.* at 109-110; *Gallo Cattle Co.*, 185 F.3d at 970-971.

One of CMAB's generic promotional campaigns employs the "Real California Cheese®" seal (a federally registered certification mark) in conjunction with the slogan "It's the Cheese." See *Gallo Cattle Co.*, 185 F.3d at 971, 972 n.8; Boyett, *supra*, at 110-111. In order to qualify for any benefit from this campaign, such as through coupons and in-store sampling displays, a producer of branded or private label cheeses like Gallo is required to display either the seal or the slogan on its packages. Some large retailers, seeking to receive greater advertising revenue from CMAB, even refuse to carry cheese that does not display the marks. CMAB's generic

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[5] The Milk Order was promulgated pursuant to the California Marketing Act, California Food & Agriculture Code §§ 58601, *et seq.* See *Gallo Cattle Co.* v. *California Milk Advisory Bd.*, 185 F.3d 969, 970 (9th Cir. 1999).

advertising efforts thus create a Catch-22 for producers like Gallo.

On the one hand, in order to claim benefits under the "Real California Cheese®" program for which it has paid, Gallo must display marks that convey the erroneous message that its Joseph Farms cheeses are identical in quality to those of its competitors whose packages bear the identical seals. See Boyett, *supra*, at 114. In fact, Joseph Farms cheeses repeatedly have beaten the competition in taste tests. *Id.* at 112. Use of the marks also reduces the distinctiveness of Joseph Farms' own trade mark and trade dress. On the other hand, if Gallo does not place the seals on its packages, it not only is denied the economic benefits of participation, but it also faces the risk that consumers will conclude, again erroneously, that Joseph Farms cheeses are of lower quality than those bearing California's stamp of approval. See *id.* at 114. In either case, Gallo is forced both to pay for advertising that undercuts its competitive edge and to devote its depleted advertising budget to counteracting CMAB's misleading generic message.

3. The California Raisin Marketing Order

The "California Dancing Raisins" advertisements employed by the California Raisin Marketing Board during the 1980s and 1990s offer an example of how funds paid for generic advertising can be hijacked by one segment of an industry in order to create a type of brand for its exclusive benefit.

Sun-Maid Growers of California ("Sun-Maid") is an agricultural marketing cooperative that, as of 1996, was the largest single marketer of raisins in the world, processing and marketing raisins on behalf of 1,200 raisin farmers under the well-known "Sun-Maid" trademark. See Brief of *Amicus Curiae* Sun-Maid Growers of California in Support of Respondents at 1-2, 8, *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (No. 95-1184) (hereinafter "Sun-Maid Br."). Although Sun-Maid was the largest single funder of the generic

advertising program for California raisins (see *id.* at 4), its competitors held a controlling position within the Board (see *id.* at 11 n.8). Consequently, the Board's generic promotional efforts tended to be constructed in ways that benefitted Sun-Maid's competitors.

For example, when the Board decided to use a purple box in its generic advertisements, a number of Sun-Maid's competitors began packaging their products in a purple box, effectively tying their products to the advertisements. See Sun-Maid Br. at 8-9. Sun-Maid could not mirror the advertisements, however, without destroying its own longtime trade dress, which included a red box. See *id.* at 9. Additionally, in the United Kingdom, Taiwan and Russia, the Board introduced raisin canisters carrying the image of the "Dancing Raisins" into direct competition with Sun-Maid's branded products. See *ibid.* & n.6. Thus, in effect, the generic program turned "California Raisins" into a competitive brand, a brand that Sun-Maid paid to create but could not use without harming its own long-established market identity.

B. Forced Advertising Programs Cannot Survive The Intermediate Level of Scrutiny Typically Applied to Restrictions on Commercial Speech

Because it is beyond serious dispute that forced funding of generic advertising directly impinges upon the free speech rights of producers and handlers of agricultural products, these programs must be subjected to the requisite constitutional scrutiny. Turning first to the three-part test usually applied to restrictions on commercial speech under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), a compelled generic advertising program will be upheld only if: "the asserted governmental interest [behind the program] is substantial"; the program "directly advances [that] interest"; and the program "is not more extensive than is necessary to serve that interest." *Id.* at 566. The *Central Hudson* test "is not satisfied by mere speculation or conjecture."

Edenfield v. *Fane*, 507 U.S. 761, 770 (1993). Instead, the government must demonstrate that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 771. The government's arguments in this case illustrate the inadequacies that render the Mushroom Act and generic advertising programs like it unconstitutional.

1. The government has no substantial interest in requiring collective advertising

The government cites two interests that allegedly justify its intrusion into mushroom advertising and which, presumably, it also would consider sufficient to justify other generic advertising programs. First, it points to the Mushroom Act's stated goal of stimulating demand for fresh mushrooms, thereby maintaining and expanding existing markets. See, *e.g.*, Pet. Br. 2-3, 25. Second, it asserts that such mandatory programs avoid the "free rider" problem that purportedly would result if participation were voluntary, *i.e.*, non-participating industry members would receive benefits from advertisements for which they did not pay. See *id.* at 5, 12, 26, 30. Neither justification is constitutionally sufficient.

The government relies upon assertions in the Mushroom Act and the Federal Agricultural Improvement and Reform Act of 1996 that "the maintenance and expansion of existing markets and uses" for mushrooms are "vital to the welfare" of producers and marketers (Pet. Br. 2-3 (quoting 7 U.S.C. § 6101(a)(5)), and that compelled funding of generic advertising leverages the advertising opportunities that otherwise might be unavailable to "individual producers and processors" (*id.* at 7 (quoting 7 U.S.C. § 7401(b)(7)) and "small producers" (*ibid.* (quoting 7 U.S.C. § 7401(b)(10)). Not only are such unsupported assertions a far cry from the requisite showing that "the economic health of [the industry] is in genuine jeopardy and in need of the protections" afforded by the mandatory advertising program (*Turner Broad.*, 512 U.S. at 664-665), but they also are so general as to be constitutionally meaningless.

Presumably, Congress has an interest in "the maintenance and expansion of existing markets and uses" for the products of every industry that contributes to the economic health of the nation. 7 U.S.C. § 6101(a)(5). If the mere recitation of this generic interest were a sufficient basis for restricting speech, there would be virtually nothing left of constitutional protections for commercial speech. The same would be true if the government's interest in merely raising the incomes of a favored subclass of producers and handlers were constitutionally adequate. If nothing more were required, the "must-carry" provisions in *Turner Broadcasting* and the ban on pharmacy price advertising in *Virginia State Board of Pharmacy* could have been summarily upheld. Although promoting favored industries or segments of an industry are undoubtedly sufficient grounds to sustain mere economic regulation (see *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483 (1955)), they are not sufficient to coerce or to restrict constitutionally protected speech.

The selective character of the generic advertising programs for fresh mushrooms and other agricultural products demonstrates that any claim that the programs are "necessary" for market stability or other legitimate public purposes is untenable. Why are mushrooms subject to mandatory collective advertising and not oranges, lemons, or spinach? The government points to no explanation in the legislative or administrative record that offers even a clue as to why some products are covered but not others. This suggests that the real reason speech is controlled in some markets and not others is that politically powerful actors want speech control in some markets and not in others. A hunt for genuinely public purposes — let alone "important" or "compelling" public purposes — will be left empty-handed.[6]

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[6] If, as some commentators believe, the total amount of food consumed remains stable, then advertisements for one product actually will have a "cannibalistic impact," with any increase in demand for the advertised

As for the government's contention that forced funding of generic advertising is permissible under a "free rider" theory, that argument not only lacks factual support, it manifests a fundamental misunderstanding of the "free rider" principle and, if accepted, would give the government nearly unlimited power to compel funding of speech. As Justice Scalia recognized in *Lehnert*, "private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for." 500 U.S. at 556 (Scalia, J., concurring in part and dissenting in part). An advertisement for a Ford SUV may well stimulate demand for a Chevrolet SUV; advertisements explaining the health benefits of branded aspirin may build demand for generic aspirin; the efforts of a trade association will often benefit non-members as well as members; the advertising of one candidate from a political party will often increase support for others of that party. "Free riding" in this context is simply another word for positive externalities, which are a natural part of the marketplace of ideas. If externalities were a legitimate basis for government intervention, politically powerful interest groups would waste no time in seeking laws to force "free riders" to contribute toward the communication of their messages. As the California Supreme Court observed in *Gerawan*, "in any given case, a producer who objects to generic advertising may not be attempting to ride free on the funds of others — a familiar charge — but may merely be

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product offset by decreased demand for another product for which it is a substitute. See Lee, Brown & Fairchild, *Some Observations on the Impact of Advertising on Demand*, 5 AGRIBUS. 607, 613 (Nov. 1989). The government's interest does not appear to be furthered when advertising increases returns for growers of one product, but decreases the return for growers of another product. *Ibid.*; see also Piggott, *Returns To Incremental Advertising Expenditure in the Presence of Cross-Commodity Impacts and Inseparable Markets: An Equilibrium Displacement Modeling Approach* 19-21 (1995) (noting similar problem where "advertising for a product in one market (for example, the domestic market) might increase domestic sales at the expense of sales to another market (the export market) with little or no price effect").

making an effort to prevent others from hijacking his own funds as they drive to their own destination." 12 P.3d at 743.

2. The government has not shown that mandatory generic advertising materially advances its purported interest

To satisfy the second prong of *Central Hudson*, the government must show that the mandatory forced advertising program will advance its interests "'to a material degree.'" *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 505 (1996) (quoting *Edenfield*, 507 U.S. at 771). Turning first to the government's asserted interest in avoiding free-ridership, the government's reasoning is circular; if there were no generic advertising programs there could be no "free riders."[7] As for the government's interest in maintaining and expanding the markets for agricultural products, logic and history indicate that

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[7] The government's "free rider" justification for generic advertising programs also is disingenuous, given that most such federal programs statutorily create free ridership. For example, under the Mushroom Act, fresh mushroom producers and importers of less than 500,000 pounds per year and all mushrooms for processing are exempt from the assessment requirement. 7 U.S.C. §§ 6102(6), (9), (11), 6104(g)(1)(A)-(B). See also, *e.g.*, Egg Research and Consumer Information Act, 7 U.S.C. § 2711(a)(1) (exempting producers with fewer than 75,000 laying hens); Lime Research, Promotion, and Consumer Information Act, 7 U.S.C. § 6204(d)(5) (exempting producers, handlers and importers of less than 200,000 pounds per year); Fluid Milk Promotion Act, 7 U.S.C. §§ 6402(4), 6409(a) (exempting processors of less than 500,000 pounds of milk in consumer-type packages per month); Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act, 7 U.S.C. §§ 6802(4)(B), 6804(h)(1)(C)(i) (exempting handlers with less than $750,000 in annual gross sales); Sheep Promotion, Research, and Information Act, 7 U.S.C. § 7104(i)(5)(A) (exempting importers of raw wool); National Kiwifruit Research, Promotion, and Consumer Information Act, 7 U.S.C. § 7465(b)(5)(A)-(B) (exempting producers of less than 500 pounds and importers of less than 10,000 pounds per year); Popcorn Promotion, Research, and Consumer Information Act, 7 U.S.C. §§ 7482(11), 7484(f)(1) (exempting processors of less than 4 million pounds per year).

generic advertising programs are at best ineffective and, at worst, vehicles for corruption and self-dealing.

a. Generic advertising is harmful to consumers

By forcing producers and handlers of agricultural products to fund a program of generic advertising, the government distorts the marketplace of commercial ideas to the detriment of consumers. A program that skews advertising in favor of more generic messages necessarily decreases the relative share of advertising that focuses on differences between products in the advertised category. Often, however, this is the most useful information from the consumer's point of view. See *Virginia State Bd. of Pharmacy*, 425 U.S. at 763. The government distorts the marketplace of commercial ideas to the detriment of consumers by depriving consumers of this useful information, which would be provided in greater abundance in the absence of this program.

Moreover, by making it more costly and difficult for producers to publicize quality differences, mandatory generic advertising greatly reduces producers' incentives to make the investments necessary to produce superior or distinctive products. If, for example, a government-mandated advertising program is designed to create the impression that all fresh mushrooms are essentially the same, it will be hard to make a profit by investing in a better product. Unlike a collectivized industry — such as that for California tree fruits addressed by this Court in *Wileman* — which necessarily suppresses product differences in the interest of stabilizing the industry as a whole, a fully competitive market such as that for fresh mushrooms is built upon the development and promotion of product differences. It was with this concept in mind that this Court explained in *Virginia State Board of Pharmacy* that "[s]o long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be

intelligent and well informed. To this end, the free flow of commercial information is indispensable." 425 U.S. at 765. Compelled funding of generic advertising programs undermines this fundamental principle. Accordingly, without evidentiary support, which the government does not provide, there is no basis to conclude that generic advertising advances the government's interest in stimulating demand "in a direct and material way." *Edenfield*, 507 U.S. at 767.

b. Generic advertising programs create opportunities for corruption and self-dealing

Within the past three years alone, reports of mismanagement and misuse of funds have prompted the United States Department of Agriculture ("USDA") to commence reviews of a number of the commodity-specific generic promotion programs established by Congress, all of which are funded by mandatory assessments collected from producers, handlers, and/or importers of the commodities. See, *e.g.*, Sharon Walsh, *USDA to Review Promotion Programs; Spending on Cotton Comes Under Fire*, WASH. POST, Dec. 3, 1998, at E1. We submit that this is the predictable result of replacing the competitive, profit-oriented market with a collective, governmental effort in which politically favored board members spend their competitors' money, and producers are forced to participate whether or not their contributions are well spent.

i. The National Fluid Milk Processor Promotion Program

In a 1998 audit of the National Fluid Milk Processor Promotion Program ("Milk Program") authorized by the Fluid Milk Promotion Act, codified as amended at 7 U.S.C. §§ 6401, *et seq.*, USDA's Inspector General ("IG") uncovered "serious problems with the National Fluid Milk Processor Promotion Board's ("Board") management structure and with the manner in which expenditures were made." OFFICE OF INSPECTOR

GENERAL, U.S. DEP'T OF AGRIC., AUDIT REPORT NO. 01001-3-Ch, NATIONAL FLUID MILK PROCESSOR PROMOTION PROGRAM, iv (Sept. 1998) (hereinafter "MILK AUDIT"). The IG's concerns were of sufficient magnitude to prompt him to recommend that USDA's Agricultural Marketing Service ("AMS"), which has oversight responsibility for the Milk Program (see *id.* at 1, 9), suspend the Board's operations pending restructuring, a recommendation that the AMS rejected. See *id.* at vi, 18-19.

The audit report revealed that the Milk Board relied almost exclusively on certain private contractors, namely the Milk Industry Foundation and its parent organization, the International Dairy Food Association, to conduct its generic promotion and research activities (MILK AUDIT at 2), with virtually no oversight by the Board or AMS (see *id.* at iv, 5, 9). As a result, the IG concluded, the Board had allowed payment of over $127 million — 75% of the total mandatory assessments collected by the Board — without the requisite AMS approval. *Id.* at 9, 14-15, 21.

In addition, the IG criticized the Board's entry into sole-source contracts without first requiring any competitive bidding to ensure that the contract awarded was the most cost-effective. MILK AUDIT at iv, 34. Most notably, the IG found that the "subcontract for the Board's advertising and public relations activities with a major advertising agency was let without competition." *Id.* at 34. This resulted in a windfall to the advertising agency, which received a total of $123 million from the Board — 93% of the Board's total expenses as of the date of the audit. See *ibid.* This state of affairs led the IG to conclude that "the Board may have overpaid for services and may not be obtaining the objective, professional opinions and services it expects to receive." *Ibid.* The IG also found that this advertising agency acted improperly when it awarded a subcontract to its wholly-owned subsidiary, to which it had provided inside information — ***after*** the closing of the

competitive bid period — that enabled the subsidiary to outbid its competitors. See *id.* at 36-37.

As if the wasteful expenditures and mismanagement documented by the IG's audit report were not troubling enough, it also found that not a single study had been conducted to determine whether the millions of dollars in expenditures on compelled generic promotional efforts had increased milk consumption. See MILK AUDIT at 3, 9, 16-18. In fact, the Board's Administrator bluntly informed the IG that he "did not believe anyone was interested in knowing whether the Board's activities influenced milk consumption." *Id.* at iv; see also *id.* at 16.

ii. The Federal Cotton Promotion Program

A report published in the Washington Post in late 1998 revealed similar problems in the administration of the Cotton Research and Promotion Act of 1966, codified as amended at 7 U.S.C. §§ 2101, *et seq.*, which established the Cotton Board to implement, *inter alia*, generic campaigns promoting cotton and cotton products using funds collected from cotton producers and importers. See Sharon Walsh, *Spending Hidden by a Cotton Curtain; Farmers' "Promotional" Fees Used for Golf, Topless Dancing, Alcohol*, WASH. POST, Nov. 25, 1998, at A1 (hereinafter *"Cotton Curtain"*). The Cotton Board turned over assessment funds to Cotton Inc., a private, nonprofit organization that, since its inception in 1970, had an exclusive contract with the Cotton Board to plan and execute promotional projects for cotton. See Agricultural Mktg. Serv., U.S. Dep't of Agric., *Cotton Research and Promotion Program, available at* http://www.ams.usda.gov/cotton/ctnR&P.htm. (last visited on March 6, 2001); Walsh, *Cotton Curtain, supra.*

Although the federally-appointed Cotton Board ostensibly oversaw the operations of Cotton Inc., former members of the Board explained that their oversight role "was a joke," because in practice "Cotton Inc. call[ed] the shots." Walsh, *Cotton*

Curtain, *supra*. Another former member of the Cotton Board explained that "'Cotton Inc. has the real power. They decide, their board votes. Then they present it to the Cotton Board as a fait accompli.'" *Ibid.* In fact, these insiders revealed that "Cotton Inc. officials often referred to Cotton Inc. as 'the company' and the Cotton Board as 'the cash register.'" *Ibid.* Moreover, because no other entity had ever been invited to bid for the Cotton Board's business, Cotton Inc. remained entrenched for more than thirty years as "the sole beneficiary" of the mandatory assessments collected from cotton producers and importers. *Ibid.* This relationship effectively gave Cotton Inc., which was not subject to USDA oversight, complete discretion over the expenditure of Cotton Board funds, which totaled approximately $60 million in 1998. See *ibid.*

A 1996 report of USDA's IG found that "the absence of competition . . . invite[s] inefficient and wasteful use of producer and importer funds." Walsh, *Cotton Curtain*, *supra* (alteration in original). As a recent example, one former chief executive of Cotton Inc. received a salary of $269,000 dollars in 1996 and then, after leaving his post at Cotton Inc., was awarded a $215,000 consulting contract. *Ibid.* Another controversial expenditure was the annual black tie gala at New York's Metropolitan Museum of Art hosted by Cotton Inc. for cotton ginners, textile mill owners, spinners, weavers and retailers which, as of 1997, cost in excess of $450,000. *Ibid.* The USDA IG's 1996 audit report noted that his office "question[ed] whether this annual [] event effectively promotes cotton." *Ibid.*

Less expensive, but no less shocking, was the expenditure by the Cotton Board's second highest-ranking official of $8,500 of producer and importer fees at topless bars and other adult entertainment venues — including $2,915 for what bills characterized as "personal services" — over 18 months from 1994 to 1996. See Walsh, *Cotton Curtain*, *supra*. Such lavish expenditures on "entertainment" were not uncommon. For

example, in 1992, the Cotton Board expended more than $14,000 for alcohol consumed by Board members, staff and guests at open bars during two functions sponsored by the Board. *Ibid.* Another $6,000 was spent on alcohol at a 1994 dinner attended by Board members, their spouses and guests. *Ibid.* Many of these expenses were not clearly disclosed in company books. *Ibid.*

The impropriety of this spending is underscored by the results of an evaluation of the cotton program conducted in 1996 by Texas A&M University. That study concluded that whatever benefits have accrued to the cotton industry as a result of the generic promotional efforts have flowed to textile mills, and not to the producers and importers who supply the advertising funds. See Walsh, *Cotton Curtain*, *supra*. In other words, the compelled assessments collected from cotton producers and importers provided a steady source of money to support the whims of the Cotton Board and Cotton Inc., but they provided no measurable benefit to those whom the cotton program was enacted to help — the producers and importers who were funding it.

iii. The Federal Pork Promotion Program

In March of 1999, USDA's IG issued an audit report regarding the National Pork Board's control over pork checkoff funds, which are the mandatory assessments collected from all pork producers to fund generic advertising pursuant to the Pork Promotion, Research and Consumer Information Act of 1985, codified at 7 U.S.C. §§ 4801, *et seq.* See OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF AGRIC., EVALUATION REPORT NO. 01801-1-KC, AGRICULTURAL MARKETING SERVICE CONTROLS OVER PORK CHECKOFF FUNDS, 1 (March 1999) (hereinafter "PORK AUDIT"). Like the federal milk and cotton programs, the Pork Board relied on a single contractor, the National Pork Producers Council ("NPPC"), to plan and implement the generic pork promotional campaigns. See *ibid.*

Although the IG's audit did not discover any material misuse or loss of checkoff funds, he did conclude that, because neither the Pork Board nor the AMS conducted or required compliance reviews, "an average of about $10.5 million checkoff funds distributed to State associations each year ($31.6 million from 1995 through 1997) are vulnerable to waste, loss, and misuse." PORK AUDIT at 20. The IG also concluded that the Pork Board "ha[d] relinquished too much authority to" NPPC and "ha[d] placed the NPPC in a position to exert undue influence over Board budgets and grant proposals," thus "weaken[ing] [the Board's] accountability over contributed funds." *Id.* at i; see also *id.* at 8.

According to the IG, the lack of accountability to pork producers was exacerbated by the Pork Board's failure to establish inclusive voting procedures for Board delegates and its failure to monitor state elections practices. See PORK AUDIT at 24. In a review of elections conducted in five states, the IG found that fewer than one percent of eligible pork producers voted in four of the states and that fewer than three percent voted in the fifth. *Id.* at 24-25. The IG attributed these low turnouts to the limits imposed by the state pork producer associations on the number and location of voting sites available to producers and to their refusal to permit mail-in balloting. See *id.* at 24.

3. Mandatory advertising programs are not narrowly tailored to achieve the government's asserted interests

The third prong of the *Central Hudson* test requires that compulsory funding of generic advertising be "no more extensive than necessary to further" the government's interest. 447 U.S. at 569-570. In *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993), this Court indicated that a restriction on commercial speech would not be deemed to satisfy this element of *Central Hudson* if there are "obvious less-burdensome alternatives to the restriction on commercial

speech." *Id.* at 417 n.13; see also *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 490-491 (1995). Because a host of alternative methods, each of which is less intrusive to free speech rights than forced funding of generic advertising, could achieve the government's asserted interests, the mushroom advertising program fails the third prong of the *Central Hudson* test.

If the mushroom industry or any other agricultural industry needs economic assistance, the government could provide financial subsidies or tax incentives directly to growers and handlers. If advertising is necessary, the most obvious less restrictive alternative has already been enacted: laws facilitating agricultural cooperatives.[8] Agricultural cooperatives have created and marketed some of the most recognized and successful brand names in the world — Sun Maid Raisins, Ocean Spray Cranberries, Land-O-Lakes Butter, and Sunkist Oranges. A legislature also could implement a ***voluntary*** collective advertising program that provides financial or other incentives to those who participate. Or, the government could advertise directly, and spread the cost among all taxpayers rather than only among producers and handlers. And, of course, producers and handlers who wish to take advantage of joint collective advertising could create their own trade associations without any government involvement at all. All of these options would burden speech substantially less.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

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[8] Both federal and state laws recognize the effectiveness of agricultural cooperatives and encourage their formation. See, *e.g.*, 7 U.S.C. § 610(b)(1); 12 U.S.C. § 1141a(3); 7 U.S.C. § 291; Cal. Food & Agric. Code §§ 54038-54039, 54031(a).

Respectfully submitted.

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